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First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	:	**CAM/00KF/LSC/2015/0075**
Property	:	**Flat 8 Stowe Court, Silverdale Avenue, Westcliff-on-Sea, Essex SS0 9BA**
Applicant	:	**Hinkling Properties Ltd.**
Respondent	:	**Richard John Nolan**
Date of receipt from the County Court	:	**18th September 2015**
Type of Application	:	**To determine reasonableness and payability of service charges and administration charges**
The Tribunal	:	**Bruce Edgington (lawyer chair)** **Stephen Moll FRICS** **John Francis QPM**
Date and venue of hearing	:	**26th November 2015** **Southend Magistrates Court, Victoria Avenue, Southend-on-Sea, Essex SS2 6EU**

DECISION

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1. Of the amounts claimed, the decision of the Tribunal is as follows:-

Detail	Amount(£)	Decision
External and internal decoration	721.00	reasonable and payable
Window replacement	2,247.04	reasonable and payable
Section 20 administration fee	178.08	reasonable and payable
Preparation of court claim	300.00	a reasonable amount is £150
	3,446.12	
Court fee	250.00	a matter for the court
	3,651.12	

2. The total amount payable by the Respondent in respect of service charges and/or administration charges is £3,296.12, i.e. excluding costs subsequently claimed for any court hearing and the court fee.

3. The Respondent is also ordered to pay to the Applicant the hearing fee of £80 paid by the Applicant to the Tribunal for this hearing by the 31st December 2015.

4. The application is transferred back to the County Court sitting at Southend under case no. B27YM844 to enable either party to apply to the court for any further order dealing with any costs claimed within the court proceedings, or the issue fee claimed or enforcement.

Reasons

Introduction

5. On 25th June 2015, the Applicant, as freeholder of the building of which the property forms part, issued proceedings in the County Court against the Respondent as the long leaseholder of the property claiming £3,446.12 plus court fee for service charges and administration charges. The calculation of this claim is set out in the decision above.

6. The Respondent filed a defence, prepared by solicitors, which made technical points about the claim i.e. the cost of window replacement is not covered by the lease; the service charges are not relevant costs and/or are not reasonable and, finally, the Applicant is put to strict proof of the service charges having been incurred.

7. The claim was transferred to the County Court sitting at Southend and by order of District Judge Ashworth dated the 2nd September 2015, the following question was transferred to this Tribunal 'for determination' i.e. *"whether the sums claimed are (a) the responsibility of the* (Respondent) *and, if so, (b) reasonably incurred, and/or (c) reasonable in amount".*

8. The Tribunal prepared its usual directions order on the 21st September 2015 by which Applicant was ordered to file and serve a statement justifying the claim. This was duly filed and served. The Respondent was similarly ordered to file and serve a statement setting out what he was challenging, why and what he would consider to be a reasonable amount. No such statement was filed. A bundle of documents was provided for the Tribunal.

The Inspection

9. The members of the Tribunal inspected the property in the presence of Michelle Williams and Joanna Holland from the Applicant's managing agents, Arkasian Property Management. It is a double fronted end of terrace house of rendered brick construction originally built in the 1920's or thereabouts with an extension at the rear and which has been converted into flats. It has a pitched roof of interlocking concrete tiles with flat roofed dormers at front and rear faced with hanging tiles.

10. There is limited on street parking and some off street parking at the rear although this flat does not have an allocated parking space. There is a small front garden.

11. The outside of the property in which the flat is situated had obviously been re-decorated fairly recently. This involved preparing and painting all the outside walls as they are rendered from ground level to roof level. The barge boards and

soffits had been painted. The windows had been replaced with uPVC double glazed units. The exterior of the building looked fresh and well maintained which must obviously add to the capital value of the flats.

12. The members of the Tribunal were shown the internal common parts which consist of the hall and stairwell only. The invoice for the works erroneously refers to a side entrance but this does not affect the determination. The stairwell and entrance hall had, again, obviously been decorated relatively recently.

The Lease

13. The Tribunal was shown a copy of the original counterpart lease which is for a term of 99 years from 30th October 1987 at increasing ground rents. There are the usual covenants on the part of the landlord to maintain the structure of the property and insure it. Also for the lessees to pay proportionate parts of service charges incurred depending on whether they apply to the building in which the flats are situated or include a larger part of the development. There are provisions enabling monies to be claimed on account.

14. As far as the section 20 consultation fee is concerned, part of the service charges which can be recovered are "*the fees and disbursements paid to any managing agents appointed by the LESSOR in respect of Stowe Court and in connection with the collection or rents (and service charge contributions) from the Lessees of the flats and garages in Stowe Court*" (paragraph 9, Part I of the Fourth Schedule).

15. As far as the windows are concerned, the lease does not mention them specifically. The demise is simply the flat "*shortly described in the Fifth Schedule hereto the situation whereof is shown on the plan annexed hereto for the purpose of identification only edged red*". The Fifth Schedule just says "*THE FLAT: NO.8 on the ground floor*".

16. Paragraph 1 of Part I of the Fourth Schedule says that part of the service charge is "*the expenses of maintaining repairing redecorating and renewing...the roofs main structure rainwater pipes communal entryphone or systems...of the building...*".

17. Clause 6(c) of the lease is a covenant on the part of the landlord to "*maintain repair redecorate and renew...the roofs and main structure of the building*".

The Law

18. Section 18 of the **Landlord and Tenant Act 1985** ("the 1985 Act") defines service charges as being an amount payable by a tenant to a landlord as part of or in addition to rent for services, insurance or the landlord's costs of management which varies 'according to the relevant costs'.

19. Section 19 of the 1985 Act states that 'relevant costs', i.e. service charges, are payable 'only to the extent that they are reasonably incurred'. This Tribunal, as successor to the Leasehold Valuation Tribunal has jurisdiction to make a determination as to whether such a charge is reasonable and, if so, whether it is payable. It also has jurisdiction to determine whether administration charges are reasonable.

The Hearing

20. The hearing was attended only by Michelle Williams and Joanna Holland. They answered the questions raised by the Tribunal and produced the original counterpart lease including the full plan which the Tribunal had not seen before.

The Respondent's Position

21. The Respondent has been less than forthcoming in this case. The Tribunal noted that in the previous case between these parties in 2012 (case no. CAM/00KF/LSC/2011/0120) his behavior was remarkably similar. The claim had been issued in the county court. The 'defence' filed was described as giving "*no real indication about what service charges he was disputing and why*". The decision also records that the Respondent "*accepts that he has been evasive, complains about decoration works undertaken at sometime in the past, accepts the claims for insurance and ground rent and makes one or two general comments*".

22. Of particular relevance, the Tribunal decision records that at the hearing, Mr. Nolan withdrew most of his complaints and then "*accepted that he had to pay most of the monies claimed and said that the only reason he had not paid anything was because of what he felt were defective exterior decorations*".

23. When the papers were transferred from the court to the Tribunal on this occasion, the solicitors appearing to represent Mr. Nolan were Tolhurst Fisher LLP. They prepared the defence to the claim. A letter was written to them by the Tribunal on the 21st September 2015 enclosing the directions order referred to above and asking for dates to avoid for the hearing. They wrote back on the 22nd September saying that they were no longer instructed. On the 23rd September, the Tribunal wrote to Mr. Nolan direct with the directions order and, again, asking for dates to avoid for the hearing.

24. On the 9th October 2015, the Tribunal wrote to Mr. Nolan advising him of the hearing date of the 26th November 2015 and the inspection of the property at 10.00 am on that date. On the 28th October, Jefferies, solicitors, wrote to the Tribunal stating that they acted for the Respondent. On the 30th October, the Tribunal replied to them enclosing copies of the directions order, the Applicant's response to the defence filed by their client and the letter written to Mr. Nolan advising him of the inspection and hearing date with times.

25. The Tribunal then wrote to Jefferies again on the 11th November with copies of evidence submitted by the Applicant and also to notify them of the hearing venue.

26. On the 19th November, Mr. Roy Daby from Jefferies sent an e-mail to the Tribunal office stating that he had only just received the notice of the hearing. He asked for the hearing to be re-listed for 4 weeks hence. The Tribunal judge e-mailed him on the 20th November at the e-mail address he gave explaining that they had been aware of the date of the hearing from earlier correspondence; that their client had not complied with any of the directions as to the filing of evidence; that the hearing date had been fixed to suit everyone's convenience and that the defence had been filed in July, i.e. 4 months previously, with the assistance of Mr. Nolan's previous solicitors. The letter also suggested that late

evidence or skeleton arguments could still be filed and the Tribunal would look at them and decide whether they would be taken into account.

27. That e-mail was sent and was not returned. Mr. Daby e-mailed again on the 24th November saying that he had not received a reply to his message of the 19th November. He was sent a further copy of the judge's e-mail of the 20th November. He responded immediately by asking again for the case to be relisted. He said that his client was not at his address "*for that relevant period as he has been engaged out of those premises due to work commitments*". No indication was given as to when and for how long he was 'away'.

28. As the arrangements for the hearing had been made after the Respondent was asked for his dates to avoid, Jefferies had been told on the 30th October of the hearing date and neither Mr. Nolan nor Jefferies had said why the Tribunal's directions had just been ignored, the application to adjourn was refused. However, Jefferies were told that they could renew their application at the hearing on the following day. Neither Mr. Nolan, nor anyone from Jefferies nor counsel attended the inspection or the hearing. The Tribunal expresses its disappointment about this as Jefferies had made it clear that they were the solicitors 'on the record'. That obviously carries with it an obligation to attend hearings, whether they had up to date instructions or not.

Can the replacement of the windows be a service charge?

29. The starting point in these cases is to look at the lease in order to see (a) whether the windows had been demised to the tenant and (b) whether there were any other indications as to who should keep the windows in repair. All the Tribunal can say is that the lease was badly drawn. As has been said the demise referred to the flat as described in the Fifth Schedule and then added "*the situation whereof is shown on the plan annexed hereto for the purpose of identification only edged red*".

30. The lease plan did contain a part which had some red edging on it. However, this was simply to record the situation of the flat within the building for identification purposes only. It excluded walls which separated the flat from the adjoining flat when the lease, at clause 8(ii), records that these walls are severed medially i.e. half is demised to each flat. Having said that, it did include the external structural walls in accordance with clause 8(iii). The red edging did also seem to include the windows but, as has been said, they are not mentioned specifically.

31. In view of the fact that the plan is simply for identification purposes and describes itself as outlining the situation of the flat within the building, the Tribunal concludes that it cannot infer that the windows were intended to be part of the demise. It is clear that the Applicant is to maintain, repair and renew the structure at the expense of the lessees. It is therefore necessary for the Tribunal to use the general interpretation principles adopted by the courts and the Lands Tribunal in situations such as this i.e. where the lease is not clear.

32. The Applicant's agents recognise this because they mention one or more cases in paragraphs 2.16 and 2.17 of their statement. However, they produce no copy case reports. They should understand that if they are going to use case law, they

must, in future, produce case reports so that both the Tribunal and the other party can see exactly what they are referring to.

33. The case they specifically mention is **Granada Theatres v Freehold Investment (Leynstone)** [1958] 1 WLR at page 845. In fact the case is called **Granada Theatres Ltd. v Freehold Investment (Leytonstone) Ltd.** and the reference given is for the High Court decision. That decision was appealed and the reference for the Court of Appeal decision is [1959] 1 WLR at page 570. The problem with that decision is that it does not relate to windows at all. It was a decision involving the repair of a roof and front elevation to a cinema.

34. There is an authority which does deal with windows i.e. **Re The Estate of Valbourg Cecile Godman Irvine v Moran** [1992] 24 HLR 1, being a Queens Bench decision of Mr. Recorder Thayne Forbes QC which was referred to with approval and followed in the Lands Tribunal decision of **Sheffield City Council v Hazel St. Clare Oliver** [2008] WL 3909333 determined by the then President, George Bartlett QC.

35. The issue in the **Irvine** case was whether windows, including sashes, cords, frames, glazing and furniture came within landlord's implied covenants to 'keep in repair the structure and exterior of the dwelling house' as implied by section 32 of the Housing Act 1961. In the **Sheffield Council** case, the terms of the lease were basically the same i.e. the landlord had to keep in repair the 'structure and exterior' of the premises. The Leasehold Valuation Tribunal determined that this did not include replacing the windows and frames and this decision was overturned on appeal.

36. The passages of Mr. Recorder Forbes QC's judgment quoted in the later case, which is, of course, binding authority for this Tribunal are, at 262 F-G and 262M – 263B, the first of which says:-

> *"I have come to the view that the structure of the dwelling-house consists of those elements of the overall dwelling-house which give it its essential appearances, stability and shape. The expression does not extend to the many and various ways in which the dwelling-house will be fitted out, equipped, decorated and generally made to be habitable.*
>
> *I am not persuaded...that one should limit the expression 'the structure of the dwelling-house' to those aspects of the dwelling-house which are load bearing in the sense that that sort of expression is used by professional consulting engineers and the like; but what I do feel is, as regards the words 'structure of the dwelling-house', that in order to be part of the structure of the dwelling-house a particular element must be a material or significant element in the overall construction. To some extent, in every case there will be a degree of fact to be gone into to decide whether something is or is not part of the structure of the dwelling-house".*

37. He then went on to say:-

> *"Windows pose a slightly different problem. I have some hesitation about this, but bearing in mind that one is talking about a dwelling-house, and rejecting as I do the suggestion that one should use 'load-bearing' as the only touchstone to determining what is the structure of the dwelling-house in its essential material elements, I have come to the conclusion that windows do form part of the structure of the dwelling-house. My conclusion might be different if one were talking about windows in, let us say, an agricultural building. The essential material elements may change, depending on the nature and use of the building in question. In the case of a dwelling-house, it seems to me that an essential and material element in a dwelling-house, using ordinary common sense and an application of the words 'structure of the dwelling-house' without limiting them to a concept such as 'load-bearing' must include the external windows and doors. Therefore, I hold that windows themselves, the window frames and the sashes do form part of the structure. It follows that, since these are the sash windows, it would be invidious to separate the cords from the sashes and the essential furniture from the frames. So, in my judgment, the windows including the sashes, the cords and the furniture are part of the structure of the dwelling-house".*

38. The judge then went on to say that even if he was wrong, windows do form part of the exterior of the building. Thus it appears clear that if the lease doesn't say anything to the contrary, not only has the High Court but also the Lands Tribunal has determined that in respect of a dwelling house – as this property is – the structure and/or the exterior will include the windows, the window frames and furniture. Therefore, the cost of replacing the windows will be a service charge provided the cost is reasonable.

39. It should also be recorded that as a simple matter of common sense, a building such as this one benefits considerably from have all the windows in a good state of repair. In the rare cases when the lease provides that the window frames form part of the demise, the lessees who maintain their windows complain bitterly about those lessees who do not because the value of their flats is reduced. Landlords seem to be reluctant to take enforcement proceedings against those who do not keep them maintained.

The costs of decorations and window replacement

40. It is to be remembered that the main complaint by Mr. Nolan in the previous case before this Tribunal was that the window frames and exterior had not been properly maintained. He just refused to pay any other service charges because of this. He is now refusing to pay again. The windows have now been replaced and the remainder of the structure and common parts appear to have been decorated to a high standard pursuant to a section 20 consultation process.

41. It could possibly be said that replacing single glazed windows with double glazing is an improvement rather than a straightforward renewal. In the Tribunal's experience, the cost difference is relatively small and the benefits to the lessees in

terms of both capital value and letting value more than make up for this.

42. The Tribunal considered the evidence as to cost in the hearing bundle to include invoices and section 20 documents. It concludes that the costs are objectively within the bounds of reasonableness. It takes note of the fact that Mr. Nolan does not appear to have taken any part in the consultation process e.g. by nominating his own contractors (he said that he was a builder in 2012) or making any comment on the estimates obtained, and that his defence makes no specific itemised allegation of unreasonable cost. It concludes, on the balance of probabilities, that the amounts claimed for the replacement of the windows and exterior decorations are reasonable.

Administration Charges

43. There are 2 items claimed which could be described either as administration charges or charges which could amount to service charges. Both are catered for in the lease. In Part 2 of the Service Charge Residential Management Code published by the Royal Institution of Chartered Surveyors, there are sections dealing with what would normally be included within a fixed annual management fee. Neither claim would come within that category. Indeed, statutory notices for consultations are particularly suggested to be outside the scope of the fixed annual fee per flat.

44. As to the amount of the fees claimed, those claimed for administering the section 20 process are clearly reasonable. As to the £300 claimed for preparing the court proceedings, the Tribunal's view is that these are covered by the lease terms outside the small claims court rules i.e. as a matter of contract. The evidence given by Michelle Williams was that the £300 was a 'standard fee' they always charged in these cases and the work involved had taken about an hour and a half. The Tribunal's view is that this seems a very long time to issue a very straightforward claim online. Doing the best it can from the limited information available as to hourly charging rates etc., the Tribunal concludes that £150 is a reasonable sum for preparing the claim and administering the proceedings.

Conclusions

45. The amounts claimed for decoration and window replacement are reasonable as is the fee for supervising the section 20 consultation process. A fee of £150 is reasonable for issuing the claim and administering the proceedings.

46. The Applicant gave prior warning of its intention to ask for an order that the fee paid to the Tribunal for the hearing, i.e. £80, should be paid by the Respondent. In view of the result of this case and the actions of the Respondent in failing to comply with the overriding objective by assisting the Tribunal, the Tribunal considers that such an order should be made as it is just and equitable.

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Bruce Edgington
Regional Judge
1st December 2015

ANNEX - RIGHTS OF APPEAL

i. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

ii. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

iii. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

iv. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.